STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of YARBER, Minors.

UNPUBLISHED
February 13, 2014

No. 315861
St. Clair Circuit Court
Family Division
LC No. 10-000326-NA

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

The circuit court terminated the respondent-father's parental right to three of his minor children pursuant to MCL 712A.19b(3)(c)(*i*) (182 days passed from the initiation of the proceedings and the conditions that led to adjudication still exist), MCL 712A.19b(3)(c)(*ii*) (182 days passed and the parent received recommendations to rectify other conditions and those conditions have not been rectified), MCL 712A.19b(3)(g) (parent fails to provide proper care or custody for child), and MCL 712A.19b(3)(j) (reasonable likelihood child will be harmed if returned to the home of the parent). We affirm.

I. BACKGROUND

Respondent had four children with his ex-wife, HY. In 2007, HY left the marital home to enter a substance abuse rehabilitation program and then was incarcerated for her role in a home invasion. For three years, respondent cared for the children on his own. In the summer of 2010, respondent experienced problems with his live-in girlfriend, JH. JH accused respondent of physically assaulting her in front of his children. Respondent claimed that JH falsely accused him to get an advantage in their custody battle over their newborn son. Respondent was eventually acquitted of all charges arising from this incident. In the meantime, however, the Department of Human Services (DHS) took respondent's four children into care and placed them in a foster home. Within a month, the children were returned to respondent's care and he pleaded no contest to the allegations in a petition to take jurisdiction over the children.[1]

[1] The DHS also took respondent's infant son and placed him in a foster home. JH eventually regained custody of the child and the court dismissed the petition in relation to that child alone.

Between September 2010 and September 2011, respondent attempted to comply with court orders to end the child protective proceedings. Respondent completed anger management and domestic violence therapy. He engaged in a psychological examination. Respondent did not, however, complete parenting classes or individual counseling. Respondent claimed that the provider of these services was biased against him. The DHS then arranged for an "outreach" worker to evaluate respondent's parenting skills in his home. Although the worker testified that respondent and the children's homelife was appropriate, he terminated services. The worker claimed that respondent refused him access to the home's basement, and that "rumors" suggested that respondent allowed unknown individuals to live in the basement. The allegations of unknown tenants were never substantiated. During this time period, respondent also violated court orders requiring him to facilitate weekly telephone communications between the children and their mother.

On September 29, 2011, the DHS removed the children from respondent's care based on an emergency order. Respondent had been arrested in the middle of the night for attempted burglary. The children were home alone at the time. The children were placed into foster care and the oldest quickly ran away. Following that child's 18th birthday, he was dropped from the proceedings. The remaining three children were eventually placed with their mother in November 2011, and they all lived with her parents.

Respondent was jailed for two weeks following his attempted burglary arrest. He visited with the children once after his release. Thereafter, respondent did not see his children again until February 29, 2012, and failed to maintain consistent contact with the caseworkers. Respondent knew the charges relating to the burglary were not resolved and chose to evade capture rather than see his children. Respondent only resurfaced when the DHS sought termination of his parental rights. Respondent turned himself in, was arrested and jailed, and then participated in an April 2012 termination hearing. The circuit court found insufficient evidence to terminate respondent's parental rights at that time.

Following the termination hearing, respondent was again released from jail. He visited his children irregularly in May and June 2012, often cancelling and rescheduling parenting time sessions. During a July 2012 dispositional review hearing, respondent flew out of control and had to be physically removed from the courtroom. The court suspended respondent's right to parenting time and the DHS ordered him to undergo a psychiatric evaluation. Respondent never complied with that order and his visitation rights were never reinstated. A new caseworker was assigned to the matter and admitted that he never specified to respondent what services remained outstanding to comply with the court orders. Respondent was finally convicted and sentenced in relation to the September 2011 attempted burglary, but received a mitigated sentence.

In March 2013, the circuit court proceeded to hold a second termination hearing, this time to determine whether both respondent's and HY's parental rights should be terminated.[2]

[2] HY had been ordered by the court to leave her parent's home due to two incidents. The children remained in the care of their maternal grandparents. The court did not terminate HY's parental rights following the hearing.

Following extensive evidence over three days, the court determined that termination of respondent's parental rights was supported by at least one statutory ground and was in the children's best interests. This appeal followed.

II. GROUNDS FOR TERMINATION

"To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). This Court reviews a trial court's factual finding that a statutory termination ground has been established for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Moss*, 301 Mich App at 80 (quotation marks and citation omitted). "Clear error signifies a decision that strikes us as more than just maybe or probably wrong." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). Furthermore, the "clear and convincing standard is the most demanding standard applied in civil cases[.]" *Id.* (citations omitted).

Pursuant to MCL 712A.19b(3), a court "may terminate [a] parent's parental rights to a child if the court finds, by clear and convincing evidence" that at least one statutory ground has been satisfied. In this case the court found, pursuant to MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j) that respondent's parental rights should be terminated.

A. MCL 712A.19b(3)(c)(*i*)

The trial court did not err when it terminated respondent's rights pursuant to MCL 712A.19b(3)(c)(*i*). That provision states:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence finds[:]
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

In the initial petition filed on August 19, 2010, the DHS cited respondent's criminal history of assaultive and alcohol-related offenses. It also cited a history of domestic violence between respondent and JH, including four reports of assault between October 2009 and August 2010, a CPS-substantiated claim between JH and respondent on July 1, 2010, and JH's report that respondent assaulted her on July 29, 2010. According to the petition, two unidentified children witnessed the July 29 attack.[3]

[3] JH's two daughters also resided in the couple's home. It is unclear which of the seven children in residence were present.

Throughout the child protective proceedings, DHS witnesses conceded that alcohol was no longer a problem in relation to respondent. They also conceded that respondent completed anger management and domestic violence therapy. Respondent was acquitted by a jury of the assault charges related to the July 29, 2010 incident. Although the DHS uncovered more evidence of potential domestic violence from respondent's past involving his ex-wife and a "friend" he met while taking a community college course, there had been no incidents since respondent and JH ended their relationship. Respondent's current girlfriend painted a very different picture of respondent's behavior.

In supporting termination under this factor, the court emphasized respondent's "continued refusal to recognize that he too had some involvement in why these children were here, not just some false claim by somebody else." The court was referring to respondent's insistence that JH falsely accused him of assaulting her on July 29, 2010, to gain an advantage in the child custody battle over their infant son. Respondent never addressed the other four reports of violence in the year leading up that incident. And as noted by petitioner, an acquittal based on the beyond-a-reasonable-doubt standard does not require a court using the less stringent clear-and-convincing evidence standard to reach the same conclusion. See *In re Elliott*, 218 Mich App 196, 209; 554 NW2d 32 (1996). The court more generally cited respondent's focus on showing "he is being wronged himself" and not addressing the issues that brought the children under the court's jurisdiction. Although the court did not use magic words, it implied that respondent had not actually benefited from anger management and domestic violence therapy as he still would take no responsibility for his past actions. "[I]t is not enough to merely go through the motions; a parent must benefit from the services offered so that he or she can improve parenting skills to the point where the children would no longer be at risk in the parent's custody." *In re Hansen*, 285 Mich App 158, 163-164; 774 NW2d 698 (2009). On this record and despite that respondent has not recently exhibited violent conduct, we cannot discern that the circuit court clearly erred in finding clear and convincing evidence to support termination under this factor.

B. MCL 712A.19b(3)(c)(*ii*)

Under factor (c)(*ii*), a court may terminate a parent's rights if 182 days have elapsed since the child protective proceeding was opened and

> Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

In a supplemental petition filed in January 2013, the DHS contended that respondent elected to pursue counseling through a provider of his own choosing but failed to approve the release of his records to the caseworker. Noting that respondent at one time had open criminal proceedings in at least four different cities, the petition asserted that respondent had not kept the

caseworker informed of the status of those matters and apparently had not resolved those issues.[4] Further, petitioner failed to provide proof of his income.

In relation to this factor, the circuit court relied upon respondent's actions since the children were removed from his care for the second time on September 29, 2011. The court emphasized respondent's transient nature since he lost his home to foreclosure. The court cited respondent's four month disappearance from October 2011 through February 2012. Respondent voluntarily left employment during the child protective proceedings, claiming that the struggle of raising four children alone while attempting to complete court-ordered services was too onerous. Since the children had been removed from his care in 2011, the court noted, respondent had not provided proof of income and so had "demonstrated that he's not currently capable of providing for these children."

Not all the reasons cited by the circuit court in support of this factor are sound. Respondent had provided a plan to care for his children upon their return. Respondent intended to live with his aunt and uncle upon his release from jail and the caseworker had already investigated the house and found it appropriate. Financially, however, the court accurately noted that respondent had failed to provide proof of income since the children's removal despite several requests from DHS caseworkers. Respondent did propose a plan to teach martial arts in the future and informed the court that he had 13 potential clients lined up for this service. It was not clear error, however, for the court to determine that this was an unrealistic plan to provide financially for three children. Moreover, the court could have relied upon respondent's failure to maintain consistent contact with the caseworker and refusal to share information about his court-ordered counseling. In order to prove that a parent is benefitting from services, the parent must share information with the DHS and the court. Given respondent's conduct in July 2012, that resulted in the loss of parenting time with the children, it was reasonable for the court to expect respondent to keep it informed of his progress in treatment. Overall, we discern no clear error in the circuit court's conclusion that termination was supported by this factor.

C. MCL 712A.19b(3)(g)

MCL 712A.19b(3)(g) provides that a court "may terminate a parent's rights to a child if the court finds, by clear and convincing evidence" that "[t]he parent, without regard to intent, fails to provide proper care or custody to the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."

The court found that the reasons supporting termination under factor (c)(*i*) and (*ii*) equally supported termination under factor (g). Factor (g) includes elements of a past failure to provide proper care and custody and a future inability to provide proper care and custody. As such, termination under this factor was likely erroneous. The evidence revealed that respondent

[4] At the termination hearing, respondent finally provided documentation that he had resolved all outstanding criminal matters except one related to an alleged incident of domestic violence against JH in Westland.

had cared for his children as a single father for three years prior to DHS involvement. The DHS did not instigate child protective proceedings because the children were being given inadequate care. Yet, any error in this regard is harmless as the petitioner need only establish one ground to support termination of parental rights. MCL 712A.19b(3).

D. MCL 712A.19b(3)(j)

MCL 712A.19b(3)(j) provides for termination where "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." According to the circuit court,

> It is not in the best interests of the children to go into a home where the parent is involved in domestic violence and refuses to recognize his involvement in that situation and refuses to do anything about it. So an environment like that, for the same reasons the children were initially removed, would be harmful to the child[ren] to be returned to the same type of environment.

There is no evidence that respondent ever physically abused or even used corporeal punishment against his children. Respondent's oldest child who had since reached the age of majority testified that neither he nor his siblings ever witnessed domestic violence between respondent and their mother. A child need not be the victim of domestic violence to be harmed by it, however. In relation to the child custody factors of MCL 722.23, the Legislature recognized that "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child" is a relevant factor to determining best interests of the child for a custodial placement in family law matters. See MCL 722.23(k).

Here, the court had the ability to assess the credibility of the witnesses before it firsthand. Earlier in the proceedings, JH had also been involved and provided information about respondent's history of abuse against her. According to JH, at least two children who resided in the home with she and respondent witnessed at least one incident of domestic violence. HY further testified that respondent had been abusive. HY testified that she ensured the children did not witness the abuse by sending them to their rooms. Based on the court's review of this evidence, it could determine that respondent's children had either witnessed domestic violence in the past or felt the effects from parents trying to hide this behavior. Given the court's assessment that respondent had not benefited from domestic violence and anger management therapy, there was a danger that he could return to a pattern of domestic violence against his partners in the future. Accordingly, the court did not clearly err in finding clear and convincing evidence that the children faced a reasonable risk of harm if returned to respondent's care.

III. BEST INTERESTS

Pursuant to MCL 712A.19b(5), "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." A circuit court must determine by a preponderance of the evidence that termination is in the child's best interest. *Moss*, 301 Mich App at 83. "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the

parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). Moreover,

> because a child's placement with relatives weighs against termination under MCL 712A.19a(6)(a), the fact that a child is living with relatives when the case proceeds to termination is a factor to be considered in determining whether termination is in the child's best interests. Although the trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests, the fact that the children are in the care of a relative at the time of the termination hearing is an explicit factor to consider in determining whether termination was in the children's best interests. [*Id.* at 43 (quotation marks and citations omitted).]

Here, the court specifically considered that the children were placed with their maternal grandparents but noted that respondent did nothing to secure this arrangement. The court also recognized the strong bond respondent shared with his children. The court found this factor diminished because respondent "has absolutely refused to do anything to recognize his shortcomings and do anything about them." Based on respondent's inability to take responsibility and effectuate change, the court believed the children would be returned to a home with the same conditions that led to adjudication in the first place. The court also emphasized respondent's actions before and throughout the child protective proceedings to alienate the children from their mother.

The court was faced with a difficult decision. At least one of respondent's minor children stated a desire to return to his care. Another expressed how deeply she missed her father. However, the children also reported great disappointment in their father's failure to do what needed to be done to reunify the family. Moreover, there was evidence that respondent did not respect the boundaries placed by the court while the children were in relative placement. This led one caseworker to testify that the children would be inadequately protected if respondent maintained his parental rights while the children were placed under a guardianship. Although we empathize with respondent's position, we discern no error in the court's ultimate conclusion that termination was in the children's best interests.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Karen M. Fort Hood